

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1340

To be argued by
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

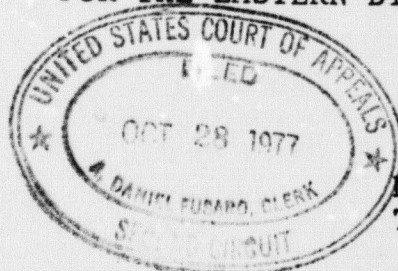
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:
:
UNITED STATES OF AMERICA,
:
Plaintiff-Appellee,
:
-against-
:
JOSEPH JOYCE,
:
Defendant-Appellant.
:
-----X

Docket No. 77-1340

B
P/S

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

STEVEN LLOYD BARRETT,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

715
Sentence

U.S. vs. **C5 CR 852**

defendant
No. of Defendants

862
75-1163
WEINSTEIN
CASE NO.

SECTION 18-1341, 2314 & 2 OFFENSES: Did devise a scheme to defraud by means of false promises, etc. (to attract distributors to purchase stereo tapes, cabinets, etc.)

COUNTS 4

BAIL • RELEASE
☐ Personal Recog.
☐ Denied ☐ Unsecured Bond
☐ AMT ☐ Conditional Release
Set (\$000) ☐ 10% Deposit
\$ ☐ Surety Bond
date ☐ Collateral
☐ Bail Not Made ☐ 3rd Party Custody
☐ Bail Status Changed ☐ PSA
(See Docket)

CLOSED

U.S. Attorney or Asst.
Douglas Kramer

Defense: ☒ CJ ☐ Ret: ☐ Waived ☐ Self
Morris K. Siegel
70 Pine Street
N.Y. 10005
944-7050

ARREST ☐ U.S. Custody Began on Above Charges ☐ Prosecution Deferred	INDICTMENT Information ☐ 11-11-75 Waived ☐ Superseding Indict/Info ☒ 2-13-76	ARRAIGNMENT 11/26/75 1st Plea II Final Plea	TRIAL Trial Set For 2/16/75 Voor Dir 3/4/76 Trial Began 3/4/76 Trial Ended 3/12/76 ☒ Not Guilty ☐ Nolo ☐ Guilty ☐ Not Guilty ☐ Nolo ☐ Guilty	SENTENCE Disposition 7 1/2 yr ☒ Convicted ☐ On All Charges ☐ Acquitted ☐ On Lesser Offense(s) ☐ Dismissed ☐ WOP; ☐ WP* ☐ Nolle/Discontinued*
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Search Warrant	Issued	DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL/No.	OUTCOME
	Return			PRELIMINARY EXAMINATION OR REMOVAL HEARING ☐ Waived ☐ Not Waived ☐ Intervening Indictment		☐ Dismissed ☐ Exonerated ☐ To Transferee District
Summons	Issued					
	Served					
Arrest Warrant						
COMPLAINT				Tape No.	INITIAL/No.	
OFFENSE (In Complaint)						

U.S. District Court
District of Columbia
Held to Answer to U.S. District Court
AT: SEP 12 1977
DANIEL FUSARO, CLERK
Magistrate's Office

Show last names and suffix numbers of other defendants on same indictment/information

DATE	PROCEEDINGS
11-11-75	Before COSTANTINO J - Indictment filed.
11-19-75	Before WEINSTEIN J - case called - deft & atty Vincent Crowe present - defts application to adjourn pleading for one week is granted - case adjd to Nov. 26, 1975 at 9:30am for pleading.
11/26/75	Before WEINSTEIN, J. Case called- deft and counsel present deft arraigned and enters a plea of not guilty-deft O.R. pre-trial conference held and concluded- trial set for 2/16/75 at 10:00 A.M.
1/26/75	Notice of appearance filed
2/16/75	Notice of readiness for trial filed
2-13-76	<u>SUPERSIDING INDICTMENT</u> filed.
2-13-76	Before WEINSTEIN, J. - Case called. Deft & counsel Morris Segal present. Deft arraigned and enters a plea of not guilty to the superseding indictment. Marking of documents set for 3-1-76 at 2 P.M. - Trial set for 3-4-76 at 10 A.M.
2/20/76	Notice of readiness for trial on superseding indictment filed
3/1/76	Before WEINSTEIN, J.- Case called- deft not present- counsel exhibits marked- trial set for 3/4/76 at 10:30 A.M.

V. Excludable Delay
(a) (b) (c) (d)
1340
AD

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
3/4/76	Before WEINSTEIN, J.- Case called- deft and counsel trial ordered and begun- jurors selected and sworn trial contd to 3/5/76				
3/5/76	Before WEINSTEIN, J.- Case called- deft and counsel present-trial resumed-trial contd to 3/8/76 at 10:00 A.M.				
3-8-76	Before WEINSTEIN J a- case called - trial resumed - deft rests - trial contd to March 10, 1976 at 9:30 am.				
3-10-76	Before WEINSTEIN J - case called - deft present - counsel not present (D.Kramer) defts counsel reported ill - trial contd to March 11, 1976 @ 9:30 am.				
3-11-76	Before WEINSTEIN J - case called - deft & counsel present - trial resumed - Morris Siegel is reported ill (counsel for the deft) Vincent J. Crowe is substituted for Mr. Siegel; with the consent of the deft. Jury retires for deliberation - Orders of sustenance filed - Lunch and coffee - Jury sent home at 6:00 PM - trial contd to May 12, 1976 at 9:30 am.				
3-11-76	By Weinstein J - 2 orders of sustenance filed.				
3-12-76	Before WEINSTEIN J - case called - deft & counsel present - trial resumed - Jury resumes deliberations at 9:40 am - order of sustenance signed for Lunch - Jury returns and renders a verdict of not guilty as to counts 1 and 2 and guilty as to counts 3 to 6 incl. Jury polled & discharged - trial concluded - defts motion to set aside verdict is denied - sentence adjd without date.				
3-12-76	By WEINSTEIN J - 2 orders of sustenance filed (Lunch and coffee etc)				
4-9-76	76 M 6 03 (CBE) inserted CR file.				
4-28-76	Before WEINSTEIN J - case called - deft & atty not present - Govts application for bench warrant is granted - Bench warrant ordered for deft. Bench Warrant Issued				
5/7/76	Before WEINSTEIN, J.- Case called- deft not present counsel present- bench warrant ordered				
5/13/76	Letter from A.U.S.A. Kramer dated 5/12/76 filed				
5/13/76	By WEINSTEIN, J.- Order filed that first bench warrant is vacated-etc. (order on bottom of above letter				
5/13/76	Bench warrant issued				
6/21/77	Before Mishler, Ch J-(Weinstein, J)-case called-deft appeared voluntarily on a B/W-no counsel present court appointed Legal Aid as counsel for the deft-bail set at \$10,000.00 with a cash deposit of \$1,000.00 to be posted by 6/22/77 @ 3:00pm/jlj				
6.22.77	Bench Warrant returned and filed from Marshal. Executed.				
6-22-77	By CHREIN J - Order for acceptance of cash bail filed.				
6-22-77	Letter filed to Legal Aid dated 6-22-77 that deft will be sentenced on July 20, 1977 by Judge Weinstein.				
7-20-77	Before WEINSTEIN J - case called - deft & counsel M.Seltzer present - deft sentenced to 5 years imprisonment under 18:3651. Deft to serve 6 mos and execution of the remainder of sentence is suspended & deft is placed on probation for 4 1/2 years on each of counts 3 to 6 incl.				

(c) (d)
Interval Start Date Ltr. Total
(per Section II) End Date Code Days

JOSEPH JOYCE

75 Yr. 852(s) Docket No. 1 Def.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
	(Document No.)	(a)	(b)	(c)	(d)
	to run concurrently. Stay of execution of sentence is denied. Clerk is directed to file a Notice of Appeal in forma pauperis. On motion of Asst. U.S. Atty. Kramer the underlying indictment is dismissed.				
7-20-77	Judgment and commitment and order of probation filed - certified copies to probation & marshall.				
7-20-77	Notice of appeal filed (no fee) Docket entries and duplicate of notice mailed to the court of appeals.				
7.28.77	Certified Copy of Judgment and Commitment returned and filed from Marshal. Deft. delivered on 7.20.77 to M.C.C., New York.				gp
8-17-77	Scheduling order filed received from the court of appeals that the record on appeal be docketed on or before 9-14-77.				
9.12.77	Record on Appeal certified and hand delivered to the Court of Appeals by Joan Gill.				gp
	A TRUE COPY ATTEST DATED <u>7-12</u> 19 <u>77</u> <u>LEWIS ORCEL</u> CLERK BY <u>[Signature]</u> DEPUTY CLERK				

NOV 11 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RECEIVED.....
F.M.,.....

----- X

UNITED STATES OF AMERICA

Cr. No. _____
(T. 18, U.S.C., §1341, §2314
and §2)

- against -

JOSEPH JOYCE,

Defendant.

----- X

75 CR 852

THE GRAND JURY CHARGES:

COUNTS ONE THROUGH THREE

1. At all times material herein, the defendant JOSEPH JOYCE was a salesman for Mackey Distributors, Inc.
2. At all times material herein, Jerome Mackey was the President of Mackey Distributors, Inc.
3. At all times material herein, Richard Taylor was the Vice President of Mackey Distributors, Inc.
4. At all times material herein, William Nelson was the Secretary-Treasurer of Mackey Distributors, Inc.
5. At all times material herein, Lester Fisher was the Sales Manager for Mackey Distributors, Inc.
6. At all times material herein, Mackey Distributors, Inc. was a corporation organized and existing under the laws of the State of New York with offices at 175 Fulton Avenue, Hempstead, New York, and purported to engage in the business of selling stereo tape distributorships.
7. Commencing in or about July, 1972, and continuing thereafter until at least March 1, 1973, the exact dates being unknown to the grand jury, within the Eastern District of New York, the defendant JOSEPH JOYCE and Jerome Mackey, Richard Taylor, William Nelson, Lester Fisher and

others did knowingly and wilfully devise and intend to devise a scheme and artifice to defraud prospective stereo tape distributors and to obtain money from these distributors by means of false and fraudulent pretenses, representations, and promises, well knowing at the time that the pretenses, representations, and promises would be and were false and fraudulent when made, which scheme and artifice is set forth hereinafter.

8. It was a part of the scheme and artifice that Mackey Distributors, Inc. would and did cause advertisements, offering for sale stereo tape distributorships, to be placed in various newspapers throughout the United States to attract potential distributors.

9. It was a further part of the scheme and artifice that the persons responding to the advertisements would be induced to purchase stereo tape distributorships, and would be told that the nature of the business was as follows:

(a) Each distributor would purchase cabinets, each containing 40 stereo tapes.

(b) The cabinets would be located in various stores and places of business by "professional locators" employed by Mackey Distributors, Inc.

(c) The minimum number of cabinets sold to a distributor would be ten, and the cost to the distributor for the ten cabinets containing a total of 400 tapes placed in ten locations would be approximately \$2,375.

(d) The merchants on behalf of the distributor would display the cabinets in their stores and sell the tapes to the general public.

(e) From time to time the distributor would restock the cabinets with stereo tapes and collect from the merchants where the cabinets were located proceeds from the sale of the tapes.

(f) Both the merchant and the distributor would make approximately one dollar on the sale of each tape.

10. It was a further part of the scheme and artifice that the distributors would be induced to make full payment for the purchase of the distributorships in advance of receiving the cabinets, tapes and locations.

11. It was a further part of the scheme and artifice that the defendant JOSEPH JOYCE and Jerome Mackey, Richard Taylor, William Nelson, Lester Fisher and others would and did make and cause to be made the following false and fraudulent pretenses, representations, and promises to the prospective distributors, well knowing that these pretenses, representations, and promises would be and were false and fraudulent when made:

(a) That Mackey Distributors, Inc. would furnish "major label" first quality tapes to the distributors;

(b) That skilled "professional locators" would locate the cabinets and stereo tapes in highly marketable locations;

(c) That the cabinets each containing 40 stereo tapes, would be provided in full and completely located within two to three weeks after payment in full was received;

(d) That the prospective distributors had a money back guarantee, in that after one year Mackey Distributors, Inc., would repurchase the distributorships if so requested by the distributors;

(e) That Mackey Distributors, Inc. would relocate cabinets where the location averaged less than five tape sales per week.

12. It was a further part of the scheme and artifice that the defendant JOSEPH JOYCE and Jerome Mackey, Richard Taylor, William Nelson, Lester Fisher and others would and did cause prospective distributors to be furnished with a list of references of purportedly successful distributors of Mackey Distributors, Inc., and that the following false and fraudulent representations would be and were made to prospective distributors by two of the references, the defendant and others well knowing at the time that the representations would be and were false and fraudulent when made:

(a) That these two references were distributors of Mackey Distributors, Inc.;

(b) That their distributorships were successful.

13. On or about each of the dates hereinafter set forth, within the Eastern District of New York, for the purpose of executing the scheme and artifice and attempting to do so, the defendant JOSEPH JOYCE and Jerome Mackey, Richard Taylor, William Nelson, Lester Fisher and others caused the advertising agent of Mackey Distributors, Inc., F & N Advertising Company, to place in post offices and authorized depositories for mail matter in Hempstead, New York, various envelopes containing advertisements to be sent and delivered by the United States Postal Service as hereinafter set forth in Counts One through Three.

<u>COUNT</u>	<u>DATE OF MAILING</u>	<u>ADDRESSEE</u>
One	August 24, 1972	Boston Globe 135 Morrissey Blvd. Boston, Mass. 02107
Two	September 9, 1972	The Utica Press 221 Oriskany Plaza Utica, New York 13508
Three	October 1, 1972	Philadelphia Inquirer 400 N. Broad Street Philadelphia, Pa. 19101

In violation of Title 18, United States Code, Sections 1341 and 2.

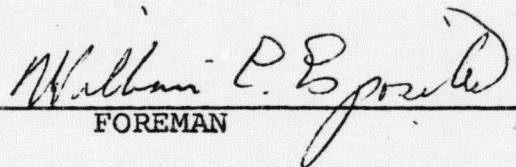
COUNT FOUR

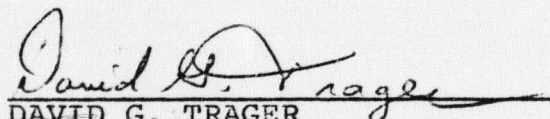
1. The Grand Jury incorporates by reference and realleges herein all of the allegations contained in paragraphs "1" through "12" of Counts One through Three of this indictment.

2. On or about October 26, 1972, within the Eastern District of New York and elsewhere, the defendant JOSEPH JOYCE transported and caused to be transported in interstate commerce from Philadelphia, Pennsylvania to 175 Fulton Avenue, Hempstead, New York a certified check, number 0998586, dated October 26, 1972, drawn on the Provident National Bank, payable to Mackey Distributors, Inc., in the sum of \$10,100, the defendant JOSEPH JOYCE knowing the same to have been taken in the execution of the aforesaid scheme and artifice to defraud.

In violation of Title 18, United States Code, Sections 2314 and 2.

A TRUE BILL


FOREMAN


DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

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THE COURT: Good morning, Ladies and Gentlemen. I'm sorry for the slight delay. Mr. Siegal is still ill. But, one of his Law Associates has kindly consented to take his place with the Defendant's permission for this purpose so we'll be able to proceed this morning.

I am now going to tell you what the law is as it applies to this matter and I want you to follow my instructions. You're going to decide the facts. You alone have that responsibility.

I have no views as to the guilt or innocence of this Defendant and nothing I've said or done during

1
2 the course of the proceedings should indicate to you
3 that I have such a view. All of my rulings were based
4 upon questions of law and are of no concern to you.
5 They do not reflect any indication of my views on
6 this case.

7 The fact that the prosecution was brought in
8 the name of the United States does not entitle the
9 Government to any more consideration than anybody
10 else would get. Nobody is entitled to sympathy or
11 favor in this Court. Everyone is equal.

12 The Defendant was indicted. I've already told
13 you that an indictment is entitled to no weight at
14 all. It's just a way of bringing a case into Court.
15 This Defendant has pleaded not guilty and that means
16 that the Government has the burden of proving guilt
17 beyond a reasonable doubt with respect to each ele-
18 ment of the crimes he is charged with committing. A
19 Defendant does not have to prove his innocence. He
20 doesn't have to submit any evidence at all.

21 He is presumed to be innocent and that presump-
22 tion remains with him throughout your deliberations.

23 A reasonable doubt means a doubt sufficient
24 to cause a prudent person to hesitate to act in the
25 most important affairs in his or her life. Reasonable

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doubt may result from the evidence produced or from the lack of evidence in the case. Finding an individual to be guilty of a crime and subjecting him to the possibility of penalties is serious and you will consider that factor in determining whether you have a reasonable doubt. Nevertheless, if at the end of the trial you are convinced beyond a reasonable doubt that this Defendant is guilty as charged, then you should find him guilty of the crime.

He's charged with violating three provisions of the United States Code, Sections 1341, 2314 and Section 2 of Title 18. The first five counts are based on Section 2 and 1341. Now, section 1341 reads as follows, it is the so-called mail fraud statute.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered to the Postal Service or takes or receives therefrom

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2 any such matter or thing, or knowingly
3 causes to be delivered by mail according to
4 the direction thereon, or at the place at which
5 it is directed to be delivered by the person
6 to whom it is addressed, any such matter or
7 thing shall be guilty of an offense against
8 the laws of the United States."

9 You will notice the gist of the offense is
10 willful use of the mails and carrying out or attempt-
11 ing to carry out a scheme to defraud. The mails
12 must have played a significant part in enabling the
13 Defendant to carry on a fraudulent scheme with the
14 others involved in the fraudulent scheme.

15 Use of the mails must be an integral part of
16 the mode of operation.

17 Section 2 of the United States Code, the aiding
18 and abetting statutes read as follows:

19 "Whoever commits an offense against the
20 United States or aids, abets, counsels, com-
21 mands, induces or procures its commission,
22 is punishable as a principal. Whoever willfully
23 causes an act to be done which if directly
24 performed by him or another would be an
25 offense against the United States, is

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2- punishable as a principal."

3 I'll explain those provisions in some detail
4 in a moment. But you will note that it permits the
5 finding of guilt without proof that the Defendant
6 personally did every act constituting the offense
7 charge. If he aided others in committing the fraud
8 and use of mails as is charged here.

9 The first three counts are based on the alleged
10 mailings of advertisements. The next two counts stem
11 from the mailing of the distributors checks.

12 Now, I'm going to read to you the indictment.
13 If you want the indictment you can have it. Just ask
14 for it during the course of your deliberations.

15 These are counts one through three:

16 "At all times the Defendant Joseph Joyce, that
17 is at all times that are material to this case,
18 was a salesman for Mackey Distributors, Inc.
19 and Jerome Mackey was president of Mackey Dis-
20 tributors, Inc., Richard Taylor was Vice Presi-
21 dent of that corporation and William Nelson was
22 the Secretary Treasurer of the corporation.
23 Lester Fisher was sales manager of the corpora-
24 tion. The corporation was organized under the
25 laws of New York and had its main place of

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2 business at 175 Fulton Avenue, Hempstead,
3 New York, which is within the Eastern District
4 of New York and purported to engaged in the
5 business of selling stereo tape distributorships.
6 About July, 1972, until about March, 1973,
7 Josep. Joyce, Jerome Mackey, Richard Taylor,
8 William Nelson, Lester Fisher and others,
9 knowingly and willfully devised and intended
10 to devise a scheme and artifice to defraud
11 prospective stereo tape distributors and to
12 obtain money from them by means of false and
13 fraudulent pretenses, representations and
14 promises knowing at the time that these pro-
15 mises and representations were false and
16 fraudulent when made. It was a part of the
17 scheme that the corporation would cause adver-
18 tisements or offering stereo tape distributor-
19 ships to be placed in various newspapers
20 throughout the United States to attract these
21 people. And that the persons responding to
22 the advertisements would be induced to purchase
23 the distributorships and would be told that
24 the nature of the business was as follows.
25 Each distributor would purchase cabinets each

1 containing approximately 40 stereo tapes.

2 The cabinets would be located in various stores
3 by professional locators employed by the corp-
4 oration.
5

6 The minimum number of cabinets
7 would be 10 for a total of 400 tapes to be
8 placed in 10 locations, and the cost would be
9 approximately \$2,375. The merchandise would
10 be displayed in the cabinets and the tapes would
11 be sold to the public. The distributors would
12 restock the cabinets with stereo tapes and
13 collect the proceeds from the sale. The mer-
14 chant and distributor would make approximately
15 a dollar each for the sale of each tape. The
16 distributorships would be sold by the distribu-
17 tors making full payment for the purchase of the
18 distributorship in advance of receiving any
19 cabinets, tapes or locations.

20 The Defendant Joseph Joyce, Jerome
21 Mackey, Taylor, Nelson and Fisher and others
22 would then cause the following false pretenses,
23 representations and promises to be made. That
24 Mackey Distributors Inc. would furnish major
25 label tapes, first quality tapes to the distri-

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2 butors. A skilled professional locator would
3 locate the cabinets in highly marketable loca-
4 tions. The cabinets containing 40 stereo tapes
5 would be provided full and completely located
6 within two or three weeks after payment was
7 received. That the prospective distributors
8 had a money back guarantee that after one year
9 Mackey would repurchase the distributorships
10 if requested. The corporation would relocate
11 cabinets if a location averaged less than five
12 tapes sales per week.

13 As part of the scheme the defendant
14 and the others named would cause prospective
15 distributors to be furnished with a list of
16 references purportedly successful distributors
17 and the following false and fraudulent
18 representations were made to prospective dis-
19 tributors by two of the references. The
20 defendant and others, well knowing that the
21 representations would be and were false and
22 fraudulent. That these two references were
23 distributors of Mackey, Mackey Distributors,
24 Inc., and that their distributorships were
25 successful.

As part of this scheme for the purpose of executing it, the various named people including the Defendant caused the advertising agent, F & N Advertising Company to place in depositories, authorized depositories for mail matter in Hempstead, New York, various envelopes containing the advertisements which were sent and delivered by the United States Postal Service and the specific mailings that were charged are the following three."

Each one is a count and separate charge. One on August 24th, 1972, to the Boston Globe in Boston. The second on on September 19th, 1972 to the Utica Observer Dispatch in Utica, New York, the third on October 1st, 1972, to the Philadelphia Inquirer in Philadelphia. All in violation of Title 18 of the United States Code, Section 1431 and 2.

So, those are the first three counts, those three pages of the advertisements.

Now, let me get to counts four and five. Counts four and five having all the general allegations originally I read to you and the additional following allegations. That the Defendant with the

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2 others named knowingly caused the distributor-mailers
3 to place in Post Offices and authorized depositories
4 checks to be sent and delivered by the United States
5 Postal Service to Mackey Distributors Inc. at 175
6 Fulton Avenue, Hempstead, New York. Count four is
7 that on September 14th, 1972, Mr. Paul Zuck sent a
8 check from Quincy, Massachusetts to Hempstead through
9 the Postal Service.

10 Count five is on September 28th, 1972, Thomas
11 Connor, you remember his wife testified, sent a check
12 from New York Mills to Hempstead.

13 Now, what does that all mean in terms of what
14 the Government has to prove? The Government has to
15 prove three essential elements beyond a reasonable
16 doubt. First the act or acts of having devised and
17 having intended to devise a scheme or artifice to
18 defraud certain distributors, customers out of money
19 or credit by means of false or fraudulent represen-
20 tations concerning the services and activities of
21 the Mackey Distributors Inc. as charged.

22 Second, the act or acts of the placing or
23 causing to be placed in the mail envelopes containing
24 advertisements as charged in counts one, two and
25 three. The check and the contract material as charged

1
2 in counts four and five.

3 Third, the act of using the United States
4 mails willfully and with the specific intent to carry
5 out some essential step in the execution of the
6 scheme.

7 You must find that the Defendant was a knowing
8 and willful participant in the fraudulent scheme at
9 the time of the mailing. If he became aware of the
10 fraud after the mailing and then joined the scheme
11 after any particular mailing, he cannot be convicted
12 of that particular mailing. But, if he joined the
13 scheme before the mailing and was aware of the mailing
14 and all of the other matters I have told you about
15 that were proven, or that proved that, then he could
16 be found guilty of using the mails and the mails
17 must have been necessary to effectively carry out the
18 scheme.

19 Defendant would have had to know that the
20 mail would follow in the ordinary course of business
21 and he must have reasonably foreseen there would be
22 use of the mails. He would have had reasonably to have
23 foreseen for example, that advertisements would have
24 been placed through the mails. He would have had to
25 reasonably foreseen and if you are to find him guilty

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2 of count four and five, that the customers would
3 mail the checks from the various parts of the country
4 to the headquarters. If he told them, or advised
5 them to send them by mail, that would of course be
6 proof you can consider on that point.

7 If he wasn't aware of the fact that these
8 advertisements were being placed by mail, didn't
9 know how these advertisements were placed, that also
10 would be proof with respect to what you would consider
11 in respect to counts one, two and three.

12 The words scheme or artifice includes any
13 plan or course of action intended to deceive others.
14 Or any false representations or promises made in
15 order to obtain money from those who are deceived.

16 A statement or representation is false or
17 fraudulent if it's known to be untrue and if it's
18 made with intent to deceive.

19 You can ask yourselves, for example, did the
20 Defendant represent the major label tapes and top
21 tune tapes would be supplied knowing that Mackey
22 did not intend to supply them. A statement is false
23 if it was untrue when made and was then known to be
24 untrue by the person making it or causing it to be
25 made.

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3 A false or fraudulent representation may be
4 made by statements or half truths with a concealment
5 of material facts or by innuendo as well as by affirma-
6 tive statements or acts.

7 Now, it is not necessary that the defendant
8 himself do any of the actual mailings. It is suffi-
9 cient that the mails were used to carry out the scheme
10 and that it was reasonably foreseeable. But, the use
11 of the mails must bear a substantial relationship to
12 the scheme and it must be for the purpose of executing
13 the scheme.

14 So, you have to ask yourself with respect to
15 that, would it be possible and convenient to carry
16 out a national operation, such as was testified to
17 here, without the use of mails or was it a part of
18 the total operation.

19 So, in order for the Defendant to be guilty
20 of counts one, through three, it is necessary that
21 the evidence established beyond a reasonable doubt
22 that the envelopes containing the advertisements were
23 willfully mailed or caused to be mailed by a person
24 accused or who aided and abetted with the intent to
25 carry out an essential step in the execution of the
scheme.

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2 Similarly for counts four and five it is essen-
3 tial that the Defendant assisted others who made
4 mailings in the course of the total scheme. An act
5 is willful and intentional if it is done deliberately
6 and with specific intent to accomplish something the
7 law forbids. To act with intent to defraud means to
8 act knowingly and with the specific intent to deceive.

9 Ordinarily it's for the purpose of financial
10 gain.

11 An act is not knowing if it is committed be-
12 cause of inadvertence, carelessness, negligence, stu-
13 pidity, or some other non-criminal reason. Unknowing
14 participation is not sufficient to constitute the
15 offense. You should acquit the defendant if you're
16 not satisfied beyond a reasonable doubt that he knew
17 of the fraudulent activity if any, of others in the
18 company.

19 However, one may not be willfully and intention-
20 ally ignorant and deliberately remain ignorant of a
21 fact important and material to his conduct in order
22 to escape the consequences of the criminal law by
23 later on saying I didn't know.

24 The Defendant could not deliberately close his
25 eyes to what was going on around him in order to permit

him to contend that he was deceived by his associates.

The act and the state of mind of this Defendant has to be inferred from what you heard here and from the various records that you have. Each of these mailings, as I have stated, constitutes a separate offense.

Hempstead Avenue is within the Eastern District. You may not convict a Defendant of any other offense which took place wholly outside the Eastern District. But, if an offense began in one district and continued into this District or a major or substantial part of the offense was taking place here in the home office by others, that would be sufficient to find that the case was properly brought here.

I also mention that Mr. Joyce is charged as an aider and abeter. This permits you to find him guilty of aiding and abetting the violation of the mail fraud statute, even though he didn't know all of the details or didn't know that specific mailings were going to take place. If he were to deliberately help others who were doing this work. If he were doing it knowingly, it's necessary that the Defendant willfully and knowingly associated himself some way with the criminal venture that is charged. Where--that he was

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2 a willful participant in it and it is something that
3 he intended to bring about.

4 If you want to find out if this Defendant
5 aided and abetted, you have to ask such questions as
6 did he willfully and knowingly associate himself with
7 the criminal venture which used themails as part of
8 the scheme to defraud. Did he participate in it as
9 something he intended and wished to bring about.
10 Did he seek by his actions to make the scheme succeed.
11 If he did, he's an aider and abetter of those others
12 who testified here and is punishable to the same
13 extent as any principal.

14 The crucial factor here is obviously whether
15 the Defendant knew there would be no deliveries of
16 the tapes that were sold. That is the major top
17 tune labels and the cabinets and locations promised
18 would not be delivered and then he continued to take
19 orders from new customers who would pay their money
20 when he knew that they would not probably get what
21 they were paid for. But, it's not a crime for any
22 salesman or other businessman to be overly optomistic
23 or fail in business.

24 So, the question for you to decide here is
25 whether fraud or good faith was involved when this

Defendant admitted this activity. Now, the final count in the indictment reads as follows and that incorporates all the material I have already read to you about the scheme and the like. On or about October 26th, 1973, Joseph Joyce transported and caused to be transported in the interstate commerce from Philadelphia to Hempstead, New York, a certified check, number 0998586 dated October 26th, 1976, drawn on the Provident National Bank, payable to Mackey Distributors Inc. in the sum of \$10,100 this the Defendant Joseph Joyce known the same to have been taken in the execution of the scheme and artifice as described.

Now, that's in violation of another section, 2314, as well as the aiding and abetting section, section 2.

Section 2314 Title 18 provides as follows:

"Who ever transports in interstate commerce any securities of the value of \$5000 or more, knowing the same to have been taken by fraud, commits a felony."

Securities include a check. You may find a certified check involved is security under the provision. Interstate commerce includes commerce between

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2 one State and another. Philadelphia is in Pennsylvania
3 and Hempstead is in New York. You can find this was
4 moving in interstate commerce.
5

6 Now, the Defendant has to be shown beyond a
7 reasonable doubt to have committed two acts. First
8 that he transported or caused to be transported a
9 check in the amount of \$5,000 or more. My recollec-
10 tion is that it was not initially disputed, but
11 your recollection will govern. Second, the Defendant
12 knew the check he caused to be transported was
13 taken by fraud. That obviously is seriously disputed
14 by the Defendant in the case. He testified that he
15 didn't know.

16 Now, I've already told you in connection with
17 counts one, through five, what fraud is and what mis-
18 representations are and the like and I don't have to
19 repeat them again. If you find that Mr. Joyce took
20 a check for more than \$5,000 from Mr. Mellody in
21 Philadelphia and brought it to Hempstead, having ob-
22 tained it by knowingly fraudulent representations,
23 then you may return a verdict of guilty of count six.

24 We also have he knowingly aided and abetted
25 aspect, with respect to count six. It makes a crime
to knowingly aid another in committing or to knowingly

1
2 cause another to commit a crime. If you find that the
3 Defendant aided or caused another to transport a check
4 taken by fraud and that the Defendant knew that the
5 check had been taken by fraud, then you can find him
6 guilty as charged in Count Six.

7 Now, you have had the Defendant testify in this
8 case. You've had a number of people who said they were
9 participants in this scheme and testified with respect
10 to their relationship to the Defendant. You've had
11 people testify who met the Defendant while he was a
12 salesman. Obviously the credibility of all these
13 people is of substantial importance in your making a
14 decision here. The assumption that when a witness
15 takes an oath and swears to tell the truth, it may
16 be dispelled by the appearance and conduct of the
17 witness as you observed it. The matter in which the
18 witness testified. All of the evidence and contrary
19 evidence in the case.

20 You can and should consider all of these fac-
21 tors in determining whether the witness is worthy of
22 belief. Consider the witnesses intelligence, his
23 motive for testifying, his state of mind. His parti-
24 cipation in the prosecution or defense. The relation-
25 ship he bears to people on each side of the case and

1
2 the way in which he might be affected by the verdict
3 that you'll have to come down with.
4

5 The fact that a witness has been convicted of
6 a crime may be considered by you as evidence of lack
7 of morality which may make it more likely that he would
8 lie than other people. Testimony of people like
9 Fisher and Taylor need to be carefully scrutinized by
10 you. In the first place they have admitted that
11 they committed a crime shows a defect in character
12 that may make them more likely to lie. The second
13 fact, the fact that they may be prosecuted and punish-
14 ed may indicate they were seeking the prosecutors
15 favor for an advantage, but you have to take all of
16 that into account, that they may face possible other
17 prosecutions and will have an effect on them.

18 The Defendant himself is a competent witness.
19 He voluntarily took the stand, although he could not
20 be compelled to do so. He should not be disbelieved
21 merely because he is a Defendant and you should rely
22 upon his testimony if you believe so much of it as
23 he indicated to you and as it bears on the facts
24 before you.

25 You should weigh in the case, just as you
should with respect to Fisher and Taylor, his interest

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2 in the outcome of the trial and you may consider his
3 prior statements and explanations in assessing his
4 credibility. If you believe a witness has willfully
5 sworn to you falsely, then you can ignore that witnesses
6 testimony completely. But, a witness may be accurate
7 with respect to some part of the testimony and inaccur-
8 ate as to other parts.

9 Now, each of you is entitled to your own
10 opinion. You should carefully, and I know you will,
11 respectfully listen to each other. Discuss your
12 view points and you shouldn't hesitate to change your
13 view if you think somebody else is right or wrong.
14 But, the decision has to be, in the final analysis,
15 your own. The verdict has to be unanimous as to
16 each of these six counts.

17 Your votes sum up your duty and that is without
18 fear or favor to any person you will well and truly
19 try the issues according to the evidence and accord-
20 ing to the law.

21 Is there any objection now to excusing the
22 four alternates?

23 MR. KRAMER: No, Your Honor.

24 MR. CROWE: No, Your Honor.

25 THE COURT: The four alternates are excused.

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3 Thank you very much. Do not discuss the
4 case with anybody until after the verdict is in.
5 Get your things inside and go downstairs. Will
6 Counsel come to the side bar to see if I have
7 misspoken?

8 (The following occurred at side bar.)

9 MR. KRAMER: There is one technical mis-
10 take, I think when you said the second count in-
11 volves September 19th, it's September 9th.

12 THE COURT: What did I say?

13 MR. KRAMER: You said September 19th, it's
14 written September 9th.

15 (The following occurred in open Court.)

16 THE COURT: In my Charge when I said September
17 19th was one mailing, it's actually September 9th.
18 That is the date of the second mailing. It is not
19 critical. Anything about that time is sufficient.

20 (The following occurred at side bar.)

21 MR. CROWE: Your Honor, on page three you said
22 if he did the act and then you left out that phrase--

23 (The following occurred in open Court.)

24 THE COURT: The Defendant must have requisite
25 criminal intent as I am describing to you.

(The following occurred at side bar.)

15

THE COURT: Swear in the Marshals.

16

(Whereupon, the Marshals were sworn to keep
the Jury.)

17

18

THE COURT: You can give them some pencils

19

and papers. You may now retire to consider your

20

verdict. Do you have any questions about documents?

21

If you want them sent in, send out a note, if you

22

want any particular one or you can have all of them.

23

If you want any part of the charge explained further

24

send me a note and I'll do that. If you want any of

25

the testimony reread, do the same thing. But, the

14 MR. KRAMER: Your Honor, Madame Forelady,
15 Members of the Jury, Mr. Siegal, Mr. Joyce:

16 I want to thank all of you very much for
17 listening attentively as you have for the last three
18 days of testimony. As I stated in the very beginning,
19 in the opening, I am sure Mr. Siegal joins me in this,
20 this is an important case to the Defendant and to the
21 Government and it is important that you all do your
22 duty impartially and with all fairness to both sides.

23 Before we get into what I believe the evidence
24 showed, and I will go over the evidence with you, I
25 want to review briefly what the charges are against

1
2 the Defendant. The Defendant is charged and the
3 Judge will read the entire indictment to you in his
4 charge, with aiding and abetting and participating in
5 a scheme to defraud numbers of people and to obtain
6 their money through false and fraudulent pretenses and
7 it is charged that the mails were used in furtherance
8 of this scheme.

9
10 There are five counts to that effect and sixth
11 count is the Defendant personally transported a check
12 in interstate commerce, which check were the proceeds
13 of the fraudulent scheme or proceeds obtained by
14 fraudulent and false representations.

15
16 The charge is not that he participated in the
17 scheme where the mailings are made, but whether it
18 was foreseeable by him that the mails would be used.

19
20 The scheme which you have heard a lot of,
21 Mackey Distributors, Inc., Jerome Mackey, the scheme
22 involved the sale of distributorships to persons who
23 wanted to get into business for themselves and rather
24 broad representations were made to these individuals
25 through advertisements and other promotional material
that was referred to a number of times during the
trial and a sales presentation, the pitch. They
were told they were going to get top label, top artists,

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2 top tune stereo tapes, RCA, Decca and soforth.
3 Some of the advertisements, if you look at them,
4 this one for example, Number Two in the Utica Press,
5 they use different names, Decca, Capital, Liberty.
6 They were told they would get atleast forty to a
7 cabinet and they had to buy atleast ten cabinets and
8 they would send out trained locators to locate the
9 cabinets and find the best spots. They were told
10 by the salesmen if things weren't going right, they
11 didn't get five sales a week from each location,
12 Mackey would relocate them, presumeably in better
13 locations and would do that free of charge. They were
14 further told in the event that they could not sell
15 everything, they could send everything back, it was
16 an iron clad guarantee, that's what the contract said,
17 that's what the Defendant said.

18 These people were concerned, they were being
19 asked to make a minimum investment of \$2,500 and some
20 put in far more as you heard testimony. Mr. Mellody
21 put in over \$10,000 and he believed they were a good
22 company and they tookhis money. They were told Jerome
23 Mackey was the parent company and that Mackey was a
24 wholly owned subsidiary. So the implication was it
25 was good as gold. Mackey stood behind this subsidiary

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2 so it was presented to him as a sure-fire deal and
3 they were shown the projection sheets.

4 I'll ask you when you go into the Jury Room,
5 when you are in the Jury Room you can have this
6 Ge here, the Reporter, read back the testimony.
7 I a. u when you go into the Jury room to look at the
8 promotional material, particularly those projection
9 sheets that were shown to you. Mr. Joyce said he show-
10 ed them to everyone, that's his function. The projec-
11 tion sheets weren't based on expenditures, it's purely
12 a mathematical projection and show fairly good sums of
13 money and you can calculate that there was a series
14 of representations and as the indictment so charges,
15 these were false, misrepresentations. They were made
16 by Mr. Joyce and the indictment charges him of that
17 and I believe you'll, upon examining the evidence,
18 find that the facts show that Mr. Joyce knew he made
19 those representations falsely. He knew they would not
20 be getting major label tapes. We'll get back to that
21 in more detail later.

22 They say skilled professional locators going
23 out. And if they could get any locator at all for a
24 sum of money they would pick any old place to stick
25 the cabinets. He knew they wouldn't be getting 40 tapes,

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2 40 tapes in two or three weeks or even three or four
3 weeks. They were going to have to wait and when you
4 wait you become anxious and you'll take anything that
5 was given to you. He knew the money back guarantee
6 was false. If you stop to think about it it's an
7 impossible guarantee to keep under the circumstances
8 and they had no intention of keeping that guarantee.

9 As Mr. Fisher stated he referred to Mr. Joyce,
10 he called him a singer, he called all the representa-
11 tives singers. Remember all the distributors who had
12 happy experiences with Mackey Distributors Inc., even
13 though we'll go over the representations to Mr. Melody
14 and Mr. Joyce said he had sold one to him. It's not
15 true. Mr. Zuck, he knew how another one was increasing
16 the number of distributors and again, it's not true.

17 The indictment charges that on three occasions
18 advertisements were mailed to newspapers. You heard
19 Mr. Nelson, no relation to the Nelson of Mackey Dis-
20 tributors Inc., the advertising man, this is the way
21 it's done. Mr. Joyce of course said that Mr. Fisher
22 decided where he was going to have the ads placed in
23 the newspapers and it was reasonable for him to be-
24 lieve those ads would be mailed, somebody wouldn't
25 carry the ad by hand to the paper. The indictment

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2 charges that on August 24th there was a mail-in to
3 the Boston Globe. September 9th to the Utica Observer
4 Dispatch and one on October 1st, the Philadelphia
5 Inquirer. It also charges the mails were used, at
6 Mr. Joyce's direction, when he asked both Mr. Paul
7 Zuck and Mr. Thomas Connors to mail their checks into
8 the Mackey Office in Hempstead. There is not much
9 dispute about that and the indictment charges that Mr.
10 Joyce carried the Mellody check across State lines to
11 Mackey.

12 Now, as you heard in the opening statement,
13 The Defendant made a stipulation here at trial. The
14 principals of these corporations, Mackey Distributors
15 Incorporated have all been convicted of mail fraud.
16 Mr. Mackey, Mr. Nelson and Mr. Taylor and they all
17 testified they pleaded guilty to one count of conspir-
18 acy and he indicated the reason he was allowed to do
19 that was because he was cooperating with the Government
20 in trials involving Mackey distributors.

21 This trial today concerns another phase in
22 the Mackey Distributors Corporation. It concerns the
23 salesmen and you heard Mr. Fisher testified that Mr.
24 Joseph Joyce was the best salesman they had. You'll
25 see they collected \$60,000 from distributors. And

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2 Mr. Joyce got them all. You heard Mr. Taylor and
3 Mr. Fisher, both these men admit their participation
4 in this fraud and the Government doesn't hold them out
5 to be exemplary witnesses. When you have a flim flam
6 operation what type of people do you expect. We cannot
7 bring out the scheme without their testimony, the testi-
8 mony of someone inside this scheme, because a scheme
9 doesn't broadcast its lies to the world. That's what
10 you heard from these men. You heard about the adver-
11 tising, the type of fraud these people were putting on.
12 They were selling top label, top tunes, money back
13 guarantee. You heard about the promotional material.
14 You saw the promotional material.

15 You'll have a chance to see them again and the
16 projection sheets and so forth. You heard about the
17 guarantee of Mackey, which as you heard Mr. Taylor was
18 a guarantee they never had intended to keep. They set
19 up no cash reserves for it. In fact, this company as
20 you heard Mr. Taylor, was nefarious and as I under-
21 stand it they got \$5,000 from Jerome Mackey, which is
22 peanuts and the company was living on the money that
23 it was getting. They were constantly trying to sell
24 and keep itself above water. It had very little hope
25 from its commencement of making it.

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2 You heard the reality, what people got if they
3 got anything at all, cut-outs, bootleg tapes. You
4 heard what kind of locations, if they got any locations,
5 that the locations were, where ever they could be
6 placed. You heard of course they never got their money
7 back. In some cases, they got nothing at all. There's
8 little doubt in my mind, as I believe I said in my
9 opening statement that the testimony you've heard,
10 there's little contest over this question whether
11 Mackey Distributors Incorporated was a fraudulent
12 operation.

13 As I stated in going over the indictment there
14 is little question that the mails were used. Certain-
15 ly as to the mailings for the checks into the Mackey
16 Company by the two distributors and almost certainly
17 as the advertisement says, there's little doubt that
18 Joseph Joyce knew the mails were going to be used.

19 So, Ladies and Gentlemen, we have a scheme that
20 is fraudulent. We have the mails being used. The
21 remaining issue and the one that was indicated to you
22 both by the Government and by the Defendant when this
23 trial started was what was in Joseph Joyce's mind.
24 He went around giving this pitch out.

25 To determine what was in Joseph Joyce's mind,

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2 as I indicated, we're going to have to examine a
3 number of circumstantial facts. Because, first of
4 all, you're not going to find out what's in his mind
5 by looking at it. Nobody can tell that. Secondly,
6 it's not in the nature of the salesman, this type of
7 scheme, to go around bragging about the fact they're
8 involved in a fraudulent scheme. In fact, they don't
9 believe they're ever in a fraud, you heard Mr. Fisher
10 testify. Mr. Fisher was certainly an important per-
11 son in this fraudulent scheme and he still doesn't
12 admit to himself that he was involved in a fraud. It's
13 just the way the salesmen work. We have to examine
14 Mr. Joyce's background, his training, his experience,
15 his behavior, his motivation. The question that you
16 are to determine is was he a mere babe in the woods
17 conned by the likes of Mr. Fisher and Mr. Taylor or
18 was he an experienced con man fully aware of the
19 possibilities of meeting the promises that he was giv-
20 ing to people to buy these tapes, willing to lie in
21 order to make sales, in order to get these commissions
22 and you will recall that Mr. Joyce earned commissions,
23 no expenses covered, no basic salary. He had to sell
24 to make money.

25 Now, Mr. Joyce admitted when he was looking for

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2 a job he exaggerated about his salary. If he was
3 willing to do that, then what would Mr. Joyce be
4 willing to do to make a sale where he would make 15%,
5 it's not a big commission, but you have to make a
6 lot of sales to make money. Remember, you have heavy
7 expenses and he would make any representation to
8 make those sales. Ask yourself that, think about how
9 salesmen in this type of operation work.

10 Now, Mr. Joyce may argue that he didn't know,
11 that he didn't know of his present knowledge in his
12 mind that he was saying something false. That nobody
13 spelled it out to him in black and white and even
14 though a little bit of rational deduction would have
15 led him to the inescapable conclusion that they
16 couldn't give top tapes out through wholesale at
17 \$3.75 and sell them for \$2.00 a tape to the distribu-
18 tor, they just couldn't do it. These guarantees,
19 they could not keep them. These projections were a
20 pie in the sky. He will say it's never been spelled
21 out to me. Ladies and Gentlemen, that type of lack
22 of knowledge will not excuse Mr. Joseph JOyce here
23 from the charge. You'll be bound to follow His Honor's
24 charge on the law. You'll hear that one cannot inten-
25 tionally and willfully close his eyes to the truth,

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2 and block it out from his mind that which any person
3 who cared to seek or cared to think would find out
4 and claim to be ignorant of the truth. That type of
5 willful intentional ignorance is not a defense and
6 yet it's that type of willful ignorance, willful and
7 intentionally, willful closing of the mind that sales-
8 men and schemes such as this, including Mr. Fisher for
9 that matter, engaged in. Because, they never believed
10 that they would be involved in this fraud because they
11 didn't know and they didn't want to know. They didn't
12 want to get back in touch with their customers. They
13 really didn't want to check. What were the attempts
14 that Mr. Joyce made to educate himself, he went to the
15 Better Business Bureau.

16 You, Ladies and Gentlemen, are bound to follow
17 the evidence in this case and you don't leave your
18 common sense outside when you go into the Jury Room,
19 when you go in there apply your common sense in this
20 case and to the evidence and analyze it. We all know
21 what the Better Business Bureau is. Of course they
22 get a good reference according to the bank for Jerome
23 Mackey, and he's not going to turn up any great
24 knowledge either. Try to think what else Mr. Joyce
25 did to find out what was going on. Did he contact any

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2 of the references? Did he contact any of the other
3 distributors? Did he look at the track records and
4 actually look at the purchase orders they put in,
5 not a thing. Did he ask to see the tapes? Mr. Joyce
6 said when he was working at View Tape before he worked
7 here, he was selling this, Exhibit I. You can look
8 at this and you may not have much experience with tapes,
9 but look at it and read this and decide whether it is
10 a top label, top artist recording. If this is what
11 Mr. Joyce thought he was selling he certainly was conn-
12 ing the people and he can't say I thought it was a top
13 label tape, I'm only an ignorant person, that's what
14 I was doing for a living. Remember, Mr. Joyce's use
15 of language. You heard Mr. Fisher testify. Mr. Joyce
16 was fully conversant in the jargon of a con man. Mr.
17 Joyce denies that, of course. You'll have to decide
18 who was telling the truth.

19 Now, let's look at Mr. Joyce's background and
20 on direct examination he told truthfully that he only
21 had been in the tape business for two or three months
22 prior to coming to Mackey. But you had to wait until
23 cross examination to find out that he was not new in
24 the sales business. He was not that new even to the
25 distributorship business. He had been a salesman for

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3 several years and he had been with the Usery Talking
4 Vending Machine business. He had been involved in
5 the sales of the distributorships. After that he was
6 with View Tape, and that operation is very similar
7 in many respects to Mackey's.

8 He learned nothing new there. He told you that
9 he thought Mackey would just be another job. As I
10 say, and as you've heard, Mr. Fisher said he was famil-
11 iar with the pitch when he came to Mackey. He knew
12 of this type of scheme. Mr. Fisher had testified
13 about this scheme and it was around for a long time and
14 was very diversified. He mentioned a number of compan-
15 ies, one after another, one identical tape scheme after
16 another. Mr. Joyce was involved at the one in View
17 Tape, keep that in mind, what he knew or what he should
18 have known or what he was trying to ignore when he was
19 pitching to Mr. Conners.

20 Let's go over his training. Mr. Fisher testified
21 that Mr. Joyce came in and he was very happy to see him
22 because he was a man who had experience. Mr. Fisher
23 testified that he knew the people that Mr. Joyce was
24 working with in New Jersey. He knew where the people
25 were trained and Mr. Joyce seemed to know the pitch very
well. Okay, now, Mr. Fisher testified he told Mr.

Joyce expressly that 40 tapes were to be sold. Mr. Joyce was promising while there were 40 top label tapes there would only be only 10 top labels when the merchandise was eventually delivered.

There was some strong dispute about that. You'll hear that in the Grand Jury Mr. Fisher was somewhat vague about what he told people. You'll have to decide what Mr. Fisher's recollection was, whether it's better now or then. But, keep in mind that Mr. Fisher testified that Mr. Joyce didn't contradict him when he took the stand, they're still friends, Mr. Fisher has no chip on his shoulder and Mr. Joyce considers him a fine salesman. There's no reason for him to make up a story like this, that is so terrible to injure a friend of his. That's about all. Mr. Fisher testified that he showed this list of references and referred to them as singers. Well, you can, from your own mind, determine what that word connotes. Whether it's a legitimate term or a list of legitimate references or whether it implies something. He testified about Joyce and he seemed very confused and of course Mr. Joyce denies that.

Mr. Fisher testified that the instructions were don't contact your distributors after you've gotten

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2 that check, the hard money.

3 Now, Mr. Joyce says that's standard for sales-
4 men of distributorships, he did that at Usery and the
5 Talking Vending Machines. He told you he did the same
6 thing at View Tape, same thing. Don't contact your
7 distributors after you've made your sale. He says
8 there's a good reason for it, you waste your time and
9 --he only sold 17 contracts, he couldn't waste his
10 time going back to people who already had distributors
11 and he already has his 15%. I submit, Ladies and
12 Gentlemen, if you use a little bit of common sense,
13 the best references that a true and honest salesman
14 would have is a satisfied customer. You want to stay
15 in touch with those people. He said that as part of
16 the training and he admits to being told to do it.
17 But, it didn't raise any doubts in his mind.

18 He was told that he would be only selling 40
19 tapes. You heard the people testify about the pitch,
20 all top labels. In his view he said that he stayed
21 within the contract, he pitched what was on the con-
22 tract and he presented what was on the contract. Yet,
23 the contract doesn't talk at all about top label tapes.
24 It doesn't talk about top artists. It's ambiguous,
25 it's vaguely worded. What kind of a contract is this.

1
2 You look at it and its just a series of words,
3 nothing that could be enforced anywhere. This con-
4 tract was carefully drafted. If you look at the con-
5 tract you'll see in the first page, who ever made that
6 contract up, they made it very diversified. You'll
7 see terms in there, it's a standard contract, it's used
8 in all the tape businesses. Pass it down, just like
9 the sales pitch. Well, he, Mr. Joyce says he stayed
10 within that contract. Yet, he pitched top label, top
11 tunes. He added or implied, Mr. Joyce, was telling
12 people they would be getting what was in the contract
13 expressly. But, he considered anything which had an
14 artist and a singer on it, a top label, top tune tape.

15 He didn't even consider the tape at ViewTape
16 a reproduction, everything legal, everything legitimate.
17 You'll have to consider Mr. Zuck and Mr. Bovey. You
18 heard them testify today and you'll have to consider
19 or determine when he went to Mr. Joyce and carefully
20 drilled him as to what type of tapes he was getting,
21 because he was concerned, he knew about them and whether
22 Mr. Joyce really remained inside the contract or
23 whether Mr. Joyce used words to Mr. Bovey that would
24 imply such things as top tapes and top artists. I
25 submit, based on Mr. Bovey's past experiences, he

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2 wouldn't let any vague wording in. In fact, he added
3 an addendum to the contract. Look at the addendum
4 which Mr. Joyce advances he had cleared with the
5 company. Now, Mr. Fisher and Mr. Taylor were quite
6 sure that Mr. Joyce had to call in to get authoriza-
7 tion to phrase the contract, but never called in or
8 got authorization to change this contract. Maybe with
9 the exception of the Zuck contract, they had no know-
10 ledge that he was doing this. With the Zuck contract
11 and you have that paragraph six in the addendum, you
12 recall Mr. Taylor's testimony that they gave Mr.
13 Joyce some talking to. He said don't do it again
14 without permission, and yet well after that Mr. Joyce
15 was selling to Mr. Mellody, top tunes, top labels,
16 and taking his \$10,000.

17 Now, let's look at the behavior of Mr. Joyce
18 to see whether this was behavior of a salesman doing
19 an honest day's job or the behavior of a flim flam
20 man. First let me state that Mr. Joyce stated that
21 he used no high pressure tactics whatever. If the
22 people wanted to buy, that was fine with him.
23 Remember one thing, he got commissions out of his
24 sales and that was all he got. It's all incredible.
25 I submit to believe that he was willing to take a

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2 prospective buyer's word on the first taking and say
3 yes, I'll take that. Thinking your own experience of
4 any contacts you've had with anybody from rental
5 agencies, from homebrokers, from door-to-door salesmen,
6 are they willing to say to you how much do you want..
7 You say I'll take that. Are they willing to just
8 take that or maybe you would like this also, maybe
9 you would like this.

10 Ladies and Gentlemen, I'm not submitting that
11 Joseph Joyce was an exceptional salesman that really
12 didn't try to make a bigger sale. I submit what he
13 said on the stand was not the truth, just like many
14 other things he said on the stand. He investigated
15 Mr. Mellody and he first said he was buying 50 locations
16 himself. There is no indication from him that he
17 even started to do that. I submit he never had any
18 intention to. He told Mr. Mellody that. Mr. Joyce
19 denies having said that to Mr. Mellody. Mr. Mellody
20 has no reason to lie. Mr. Mellody was straight forward
21 and honest with you. I submit that is what Mr. Joyce
22 said and that is what you would expect somebody like
23 Mr. Joyce to say. You would expect him to give a little
24 background and these references, you just don't give
25 a reference to somebody, you don't know these references

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2 from Adam. I'm told he's a good reference, these
3 people are happy, call them.

4 You will recall Mr. Zuck's testimony of what
5 Mr. Joyce told him. Mr. Joyce told him, told him that
6 he knew these references. He knew these references
7 had increased their locations from ten to forty or
8 fifty. Keep that in mind, because Mr. Joyce now tells
9 us he never denied it, he said, he might have told
10 him that. Mr. Joyce claims he knew nothing about these
11 references, didn't even know one of the names on the
12 list was Mr. Fisher's wife. Everybody knew that and
13 Mr. Joyce denies that as well.

14 Now, Mr. Joyce told Mr. Bovey many things.
15 Mr. Bovey, as I've said before, was a man who had
16 already been burnt. Bovey was careful. Joyce mention-
17 ed the consultations on the telephone with him to
18 prepare the addendum. Now, you saw Mr. Bovey, Mr.
19 Bovey is no fool but he certainly was fooled. Mr.
20 Bovey undoubtedly had a careful conversation with Mr.
21 Joyce and Mr. Joyce didn't say I can't represent any-
22 thing outside the contract. Mr. Joyce said every-
23 thing in that addendum was a presentation that he made.
24 It was nothing new per se on the addendum, perhaps
25 for a change of price on the tapes. Bovey said everything

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2 that was in the addendum was what Mr. Joyce promised.
3 But, it wasn't in the contract and Mr. Joyce discussed
4 the specific terms, he wasn't merely parroting the
5 promotional material. I submit, Ladies and Gentlemen,
6 what he knew he was representing was false. Remember
7 Mr. Conner? Perhaps his first investment, trying to
8 get started in business. He took their money. He
9 was offering them tapes at \$1.99 and \$2.00 a tape.
10 He knew they couldn't get tapes for that price. It
11 was impossible. Anybody experienced in tapes knew
12 that. Mr. Conners didn't have the experience, as much
13 as Mr. Mellody didn't have and Mr. Zuck. Mr Bovey
14 had some and he wanted to put in the addendum and he
15 was willing to pay a premium just to get these kinds
16 of tapes. Joyce knew he couldn't give those tapes to
17 him. Joseph Joyce is not a young salesman starting
18 in business. A young salesman might go to a company
19 like Mackey and might buy the whole line, look at it
20 and go out and start pitching never knowing that he
21 was defrauding people. He has no real experience in
22 the sales area. Joseph Joyce worked for Usery,
23 worked for LaSalle, he worked for View Tape and he
24 worked for Mackey. This man is experienced, intelli-
25 gent, mature, a con man. He had in the past sold

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2 distributorships.

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4 Now, you heard Joseph Joyce testify and explain
5 every time a question was asked, you didn't get in
6 touch with your distributors, I didn't have to, I had
7 a reason for that. You didn't check with the singers,
8 and he said I had a reason for that. Mr. Joyce had
9 a reason for everything that he did here today. He
10 was well prepared. But, he asked you to believe when
11 he went into that sales business, when he went for
12 View Tape before Mackey, he made the most cursory
13 examination of that company. That he was not prepared
14 that he didn't prepare himself except for a short bit
15 of training. Keep in mind whether he's telling the
16 truth when he tells you about things like that and
17 keep it in mind about the rest of his testimony.

18 Mr. Joyce, I submit, is a con man and a con
19 man lies. A con man doesn't admit to lying, not to
20 themselves, not to anybody else. Remember when he
21 went to get a job, he grossly exaggerated. He said
22 how much he made, which wasn't true. It was grossly
23 exaggerated. Why should his behavior differ then from
24 when he worked at Mackey. As I say, you recall the
25 earnings structure at Mackey, the motivation of Mr.
Joyce. He was going out to these people lying to them.

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Thank you.

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THE COURT: Mr. Siegal?

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MR. SIEGAL: May it please the Court, Mr.
Kramer, Madame Forelady, Ladies and Gentlemen on
the Jury:

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As I was listening to Mr. Kramer, I was under

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MR. KRAMMER: Madame Forelady, Ladies and Gentlemen of the Jury as Mr. Siegal indicated under the new rules the Government now has the opportunity to offer a rebuttal in answer to some of the arguments raised by the Defendant.

At the outset I think we have to dispel one smoke screen that has been raised and that is to talk about the conspiracy. The Judge will read the indictment to you, the Defendant is not charged with a conspiracy. Thus, the question of where was the Defendant in July becomes somewhat less important. The question in the case did the Defendant participate in a scheme to defraud and to obtain money from these people by use of false and fraudulent pretenses, representations, and promises.

Now, whether or not the Defendant knew that he was defrauding these people, there's no question that he participated in this scheme, either as he claims unwittingly or as the Government claims a

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2 a knowing con man.

3 There is no conspiracy charge in this case.
4 The entire thrust of the evidence is his participa-
5 tion, his aiding an abetting of the scheme. Please
6 keep that in mind.

7 Now, there was no question as to what Mr.
8 Fisher thought they were doing. How Mr. Taylor thought
9 it was a legitimate business, but you have to determine
10 whether Mr. Joyce knew this was a fraud or was it all
11 legitimate. They can't dream because you don't want
12 to know what you're doing. You just want to get in
13 there, stick it to the customers and your thinking
14 that you're never committing a fraud, it's all a puff,
15 a slight exaggeration. These people didn't even get
16 what they paid for. They did get something, they
17 certainly didn't get what they were told they were
18 going to get. The fact that Mr. Fisher did say to
19 this day on the stand, you heard, will not admit he
20 was not in a fraud. In fact, Mr. Taylor said it was
21 a legitimate business. Mr. Joyce was a man who was
22 involved of distributorships of selling 8-Track tapes.
23 He knew how it all worked. He knew about the scheme.
24 They don't put that out as a sign asking for fraudulent
25 salesmen, apply, honor salesmen do not apply. He knew

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2 that unspoken assumption, you know what's going on.

3 Now, a question was raised when Mr. Fisher said
4 the best type of salesman was the man who had a blank
5 mind, the tape recorder who parroted the promotional
6 material, yet he told Joyce they would be getting only
7 10 top labels, Joyce really doesn't know what a top
8 label tape is as compared to a reproduction or cut-out.
9 Nevertheless, this is what Mr. Fisher told him. Why
10 would Fisher do this? First of all, Mr. Joyce came
11 to Mackey as he testified, with experience, with
12 training in 8-Track tape distributorships and it was
13 Mr. Fisher's testimony he mentioned Red Robins, I
14 believe it was the name he said, I knew I trained him
15 some time ago. I knew Mr. Joyce knew the pitch, knew
16 the line and Joyce knew what was up.

17 He was not a young salesman training him from
18 the start, but Joyce knew what he was there for and
19 he could level with Joyce and he said he did. He
20 knew the song, he knew the pictures, the hard check,
21 the hammered checks, the whole bit and he told him,
22 look, they are only getting 10. They were lucky if
23 they even got that much.

24 Now, Joyce said that he read over the material
25 and that was all he knew and that was all he had to

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2 know. Again, look at the projection sheets because
3 they are a real catcher. They create a dream--a
4 dream was created by Mackey Distributors for these
5 victims. First they saw the ad and then they saw the
6 material, the dream of making their own money, of
7 owning their own business.

8 Ask yourself, Mr. Joyce is an experienced
9 salesman and knowing what type of product they are
10 going to be sold in this type of market. Can the
11 newspapers really believe that he was selling some
12 impossible dream to some people and they could get it
13 for such a relatively small amount and a small invest-
14 ment? Ask yourselves, would intelligent men or women
15 in the world of sales really believe that. That's
16 what he was pitching.

17 In effect, Joseph Joyce considered himself a
18 good salesman and he knew of these types of schemes
19 and he tried to get you to believe he's in Alice In
20 Wonderland. If Joyce clearly believed that, he didn't
21 do very much checking.

22 Joyce and salesmen like him are going to go on
23 selling like this elsewhere and you must consider
24 Joseph Joyce is only being tried for Mackey Distribu-
25 tors.

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2 Based on his experience and based on what
3 you now know and based on your common sense, did he
4 know and did he intentionally close his eyes so he could
5 say on the witness stand without wincing, I really
6 didn't know. If he did either of those, he's guilty
7 and the verdict must be rendered, it is your duty.

8 Thank you.

9 THE COURT: It is rather late and if I charge
10 you now, you'll have deliberations that would go on
11 into the evening and I really think it's too tiring.
12 I would rather have you come in fresh. I cannot meet
13 with you tomorrow, so you'll have tomorrow off. Does
14 that inconvenience any of you or does it create a
15 problem?

16 We'll meet again 9:30 on Wednesday. I'll
17 charge you in the morning and then you can have the
18 whole day for deliberations. You can plan at lunch-
19 time that--don't bring your lunch unless you want to
20 because I'll send you out at the Government's expense
21 for lunch. You won't have to bring your sandwiches.
22 You might tell your families you might be working late,
23 I might keep you into the evening if you still haven't
24 decided.

25 ALTERNATE NUMBER ONE: May I ask a question?

CERTIFICATE OF SERVICE

October 28, 1977

I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Stanley J. Berman